UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CARMEN RIOUX, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 00-305-P-H***
	)	
LARRY G. MASSANARI,[1]	***)***	
Acting Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[2]

The applications of eighteen individuals for certain Social Security Disability ("SSD") benefits, all of whom make the same substantive claim, were consolidated for review by a single administrative law judge, who issued the same decision on each application, although each claimant received a separate written decision specific to his or her own claim. Their appeals from that decision are presented jointly to this court. The question presented concerns the appropriate application of 42 U.S.C. § 424a to cases in which applicants for SSD benefits who have received lump sum settlements on workers' compensation disability claims return to the Maine Workers' Compensation Board after receiving such approved settlements and obtain statements

[1] Pursuant to Fed. R. Civ. P. 25(d)(1) Acting Commissioner of Social Security Larry G. Massanari is substituted as the defendant in this matter.

[2] This action is properly brought under 42 U.S.C § 405(g). The commissioner has admitted that the plaintiffs have exhausted their administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires each plaintiff to file an itemized statement of the specific errors upon which he or she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. By agreement of the parties, this case was submitted for decision on the papers without oral argument. Report of Conference of Counsel and Order (Docket No. 2) at 2.

allocating the lump sum over their remaining life expectancies for purposes of minimizing the offset against social security benefits required by the statute. The commissioner declined to use the allocated weekly rates so determined in calculating the amount of benefits which these plaintiffs were to receive, despite the fact that the agency had accepted such amendments or addenda to Maine workers' compensation lump sum settlement decrees as a basis for calculating offsets under section 424a at least from some time in 1994 through early 1997. The plaintiffs challenge this result on statutory and constitutional[3] grounds.

I. Background

Each plaintiff has been determined to be disabled within the meaning of the Social Security Act and therefore entitled to SSD benefits. The disability determinations themselves are not at issue. While the defendant contends that this court lacks jurisdiction over some of the plaintiffs, counsel for the parties have agreed that this court will first decide the substantive issue with respect to those plaintiffs for whom the defendant does not contest jurisdiction. Report of Conference and Counsel (Docket No. 22) at 2. If the court adopts my recommended decision, further proceedings with respect to the following plaintiffs will be necessary: A. Cote, P. Enman, G. Gendron, R. Moody, C. Morin, M. Morin, Carmen Rioux, and D. Rugg. Defendant's Memorandum in Support of Motion for an Order Dismissing the Complaint, or Alternatively, Affirming the Final Decision of the Commissioner ("Defendant's Memorandum"), attached to Motion for an Order Dismissing the Complaint, in Part, and Affirming the Final Decision of the Commissioner (Docket No. 21) at 2 n.3 & 3 n.4 and Exh. A thereto.

[3] The plaintiffs made constitutional arguments before the administrative law judge and the Appeals Council. The Appeals Council stated that it lacked jurisdiction to consider such issues. Administrative Record for Carmen Rioux ("Rioux Rec.") at 5. The administrative law judge did not address them. The defendant does not contend that the plaintiffs may not seek relief on constitutional grounds in this court.

The defendant has not contested the evidence submitted by counsel for the plaintiffs concerning the agency's past relevant practice. The attorney who now represents the eighteen plaintiffs in this action represented 45 other social security claimants who obtained addenda to their Maine workers' compensation lump sum settlement decrees on dates from October 15, 1993 through September 24, 1996, allocating the lump sums over their respective actuarial life expectancies, submitted those addenda to the agency, and received a determination of benefit amount or a revised determination from the agency, on dates ranging from January 1, 1995 to February 18, 1997. CEF at 102-09. Beginning some time in 1997, the agency refused to accept such addenda and calculated the offset of the workers' compensation lump sum settlements based on the amount of the last weekly benefit received by the claimant under Maine's workers' compensation statutes before the settlement took effect. Recommended Decision to Appeals Council, Rioux Rec. at 17; Issue on Review and Record ("Plaintiffs' Memorandum") (Docket No. 19) at 1, 3, 4, 5. In every case, that amount far exceeds the weekly amount generated when the lump sum settlement is divided by the number of weeks remaining in a claimant's life expectancy.

Each of the current plaintiffs contends that the agency should have accepted his or her addendum as the basis for computing the offset mandated by section 424a. All but one of the current plaintiffs filed their respective addenda before October 3, 1997. CEF at 462-63.[4] After hearing oral argument and receiving exhibits, the administrative law judge issued a recommended decision applicable to all eighteen plaintiffs on September 17, 1999. Rioux Rec. at 13-19. The administrative law judge concluded that the lump sum settlements at issue were intended to be commutations of periodic payments so that it was reasonable for the commissioner to conclude that no lifetime benefit was intended. *Id*. at 17-18. He construed the addenda obtained by the current plaintiffs' counsel to be

[4] The exception, plaintiff Linda Perkins, obtained her addendum on October 7, 1997 and submitted it on December 1, 1997. CEF at (*continued on next page*)

attempts to convert the settlements into lifetime benefits — altering the original intent of the approved settlements — and accordingly invalid under Social Security Ruling 97-3. *Id*. at 18. He concluded that the proration set forth in the addenda was "in conflict with the law" and could not bind the commissioner. *Id.* The Appeals Council reviewed the administrative law judge's decision and adopted it, *id*. at 4-5, making it the final decision of the commissioner, 20 C.F.R. § 404.981.

Discussion

A. Applicable Legal Standards

The court's review in this case, in which no testimony was taken and no facts were found by the administrative law judge, "is limited to determining whether the ALJ used the proper legal standards." *Ward v. Commissioner of Soc. Sec.*, 211 F.3d 652, 655 (1st Cir. 2000). Questions of law are reviewed de novo. *Id.*

The statute at issue in this proceeding provides, in relevant part:

> **(a) Conditions for reduction; computation**
> If for any month prior to the month in which an individual attains the age of 65 —
> **(1)** such individual is entitled to benefits under section 423 of this title, and
> **(2)** such individual is entitled for such month to —
> **(A)** periodic benefits on account of his or her total or partial disability (whether or not permanent) under a workmen's compensation law or plan of the United States or a state . . .
> * * *
> the total of his benefits under section 423 of this title for such month . . . shall be reduced (but not below zero) by the amount by which the sum of —
> **(3)** such total of benefits under section[] 423 . . . of this title for such month, and
> **(4)** such periodic benefits payable (and actually paid) for such month to such individual under such laws or plans,
> exceeds the higher of —
> **(5)** 80 per centum of his "average current earnings," . . . .
> *** * ***

463.

> For purposes of clause (5), an individual's average current earnings means the largest of (A) the average monthly wage . . . used for purposes of computing his benefits under section 423 of this title . . . .
>
> **(b) Reduction where benefits payable on other than monthly basis**
> If any periodic benefit for a total or partial disability under a law or plan described in subsection (a)(2) of this section is payable on other than a monthly basis (excluding a benefit payable as a lump sum except to the extent that it is a commutation of, or a substitute for, periodic payments), the reduction under this section shall be made at such time or times and in such amounts as the Commissioner of Social Security finds will approximate as nearly as practicable the reduction prescribed by subsection (a) of this section.

42 U.S.C. § 424a. The defendant's regulation implementing this statutory provision uses essentially the same language. 20 C.F.R. § 404.408. From all that appears, the relevant language of both the statute and the regulation have remained the same since at least 1994.

On October 3, 1997 the defendant issued Social Security Ruling 97-3 ("SSR 97-3"), which addresses the manner in which an offset required by section 424a is to be calculated. The ruling provides, in relevant part:

> In *Munsinger [v. Schweiker*, 709 F.2d 1212 (8th Cir. 1983)], the Eighth Circuit held that the terms of the lump-sum settlement represented periodic payments which, without an offset, would result in duplicate benefits and that "to deny [the Commissioner] an offset of the settlement would frustrate congressional intent." This same reasoning applies to amendments or addenda to lump-sum settlements — that is, the terms of both the original stipulations and the amendments to stipulations for settlements should be evaluated in light of the Federal statute and its underlying policy to avoid duplication in benefits. If the original language of the settlement establishes receipt of benefits, establishes the classification of benefits, triggers an offset, and/or establishes an appropriate offset rate, SSA is not bound by any language in a subsequent amendment or addendum with conflicts with, or alters, those terms. If the amended terms have no factual basis or were made solely to circumvent the offset provisions of section [424a], the use by SSA of such amended terms would frustrate congressional intent to avoid duplicate benefits and will be disregarded.
>
> * * *
>
> [In the case at hand,] [t]he original award did not state that the lump-sum settlement was subject to proration over the disabled worker's life expectancy. A lump sum of $85,000, less attorney's fees, was awarded

> pursuant to the 1994 lump-sum stipulated settlement. Although the original stipulation did not specify the rate at which the lump sum would be prorated, it noted that a prior weekly rate had been paid. The original stipulation contained no other reference to the proration rate of the lump-sum award, much less any reference to the life expectancy of the disabled worker. The lump sum was prorated, then, at the prior weekly rate of $477.35.
>
> Two years later, in 1996, after offset was imposed, the disabled worker obtained an amended stipulation which expressly confirmed the 1994 Stipulation for Settlement. Nevertheless, the amendment purports to "clarify" the terms of the settlement by attempting to characterize the lump-sum award as prorated over the disabled worker's life expectancy. The amended stipulation, however, did not change the dollar amounts of the award, did not involve any appeal of the award sought or change in the actual amount of WC benefits, and did not affect in any way the rights, liabilities or obligations of the parties with respect to the actual WC award. Its terms modify the original document which did not specify that the lump sum should be prorated over the disabled worker's life expectancy. It contained no supporting factual information that the original stipulation had, in fact, been based on life expectancy.
>
> Based on section [424a], case law, and SSA policy, SSA is not necessarily bound by the terms of a second, or amended, stipulation in determining whether and by what rate a disabled worker's Social Security disability insurance benefits should be offset on account of a WC lump sum payment. SSA will evaluate both the original and amended stipulations and disregard any language which has the effect of altering the terms in the original lump-sum settlement where the terms in the amended document are illusory or conflict with the terms of the first stipulation concerning the actual intent of the parties, and where, as here, the terms in the amended documents would have the effect of circumventing the WC offset provisions of section [424a]. To give effect to such illusory terms would frustrate Congress' intent to avoid duplicate benefits.

SSR 97-3, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2000), at 174-77 (internal heading omitted).

The ruling specifically states that it does not address the situation in which an original workers' compensation settlement contains a term purporting to prorate a lump sum over the life expectancy of the applicant for social security benefits. *Id*. at 176 n.5. The ruling does not address the

question whether it is to be applied to pending claims nor does it mention any prior practice or practices of the agency in this regard.

> SSRs are interpretive rules intended to offer guidance to agency adjudicators. While they do not have the force of law or properly promulgated notice and comment regulations, the agency makes SSRs "binding on all components of the Social Security Administration." *See* 20 C.F.R. § 402.35(b)(1).

Lauer v. Apfel, 169 F.3d 489, 492 (7th Cir. 1999) (citation omitted). Accordingly, the defendant was bound by his own regulations to apply SSR 97-3 to the claim of plaintiff Perkins, who did not obtain the addendum to her lump sum settlement until four days after the effective date of SSR 97-3.[5] With respect to the remaining plaintiffs, an SSR may be applied retroactively to existing applications for benefits so long as it is properly characterized as clarifying the law or the agency's existing policy rather than making substantive changes. *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993), *overruled on other grounds, Johnson v. Apfel*, 189 F.3d 561 (7th Cir. 1999).

B. Application of the Statute and SSR 97-3

The First Circuit has addressed 42 U.S.C. § 424a on only one occasion. In *Davidson v. Sullivan*, 942 F.2d 90 (1st Cir. 1991), the plaintiff, who had settled his claim for workers' compensation benefits under New Hampshire law for a lump sum payment, *id*. at 91, challenged the administrative law judge's decision that the portion of that settlement identified as being for permanent partial impairment should be offset against his social security benefits, *id*. at 92. The court examined New Hampshire case law to determine how state law interpreted such an award and found that it was a disability benefit subject to offset under section 424a. *Id*. at 93-95. The court said that the question before the court was "whether the award at issue is a periodic benefit under a state workmen's compensation law or plan." *Id*. at 95. The plaintiff asked that the award, if found to be subject to

[5] Nothing in SSR 97-3 conflicts with this court's opinion in *Mann v. Heckler*, 1986 WL 36270 (D. Me. Mar. 17, 1986), which is (*continued on next page*)

offset, be prorated over his lifetime. *Id*. at 96. Because the issue was raised for the first time on appeal, the court remanded the case to the district court. *Id.* Whether and how the district court resolved this question is not memorialized in a published opinion. This is the only mention by the First Circuit of the issue now presented to this court.

In *Sciarotta v. Bowen*, 837 F.2d 135, 141 (3d Cir. 1988), the Third Circuit declined a plaintiff's invitation to rule that a lump sum worker's compensation settlement must be prorated over the recipient's remaining life expectancy under section 424a. In that case, the agency had prorated the settlement amount by assuming that the claimant would have received the maximum weekly benefit allowable under state law. *Id*. at 140. While finding the plaintiff's argument "extremely forceful," *id.* at 141, the court found that the defendant's failure to offer any explanation in support of his choice of method of calculation required further development of the record before a court could determine whether that method was irrational, *id*. On remand, the district court found that the defendant failed to provide sufficient further explanation and that "applying the current proration methodology to state workers' compensation lump sum settlements operates as a virtual penalty on those disabled workers who wish to avoid the expense and stress of litigation by deciding to settle their state workers' compensation claims." *Sciarotta v. Bowen*, 735 F. Supp. 148, 154 (D. N.J. 1989). The district court found that the agency's method — applying the maximum weekly benefit allowed under state law — was irrational and "cannot be used to prorate [the plaintiff's] lump sum worker's compensation," *id.* at 155, but did not address the plaintiff's contention that his life expectancy should be used instead.

In *Hodge v. Shalala*, 27 F.3d 430 (9th Cir. 1994), the court rejected both the agency's argument that the amount of offset due to a lump sum worker's compensation award should be determined by the amount previously received each month by the claimant and the claimant's argument

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discussed below.

that the offset should be determined by dividing the award by the number of months remaining in his life expectancy. *Id*. at 431. Instead, the court held that the lump sum award should be divided by the number of months remaining in the claimant's work life expectancy (to the age of 65), *id*., because applicable state law considered the lump sum award to be a substitute for a stream of payments for the remainder of a claimant's working life, *id*. at 435. "Where the monthly offset rate can be determined by the application of established state law, the clear statutory command governs. In such cases, there is simply no need to turn to the guidelines for assistance." *Id*. The guidelines to which the court refers are those set forth in the defendant's Programs Operations Manual System ("POMS"), a set of policy guidelines promulgated for use by social security employees. The First Circuit has held that the defendant is bound by his statements in POMS, which supercede any inconsistent "discussion and examples" found in SSRs. *Avery v. Secretary of Health & Human Servs*., 797 F.2d 19, 24 (1st Cir. 1986). In the instant case the plaintiffs rely heavily on a former[6] and current versions of two sections of POMS, which will be discussed in more detail below.

Finally, this court must consider its own ruling in *Mann v. Heckler*, 1986 WL 36270 (D. Me. Mar. 17, 1986), *aff'd* 802 F.2d 440 (1st Cir. 1986), in which the plaintiff asked the court to require the agency to prorate his lump sum workers' compensation settlement over his life expectancy rather than based on the weekly rate of workers' compensation benefits paid to him before the settlement. *Id*. at *1. No rate of proration was established in the lump sum award. *Id*. This court held that the defendant had not abused his discretion in choosing to prorate the award at an established weekly rate when the lump sum award did not specify a rate. *Id*. at *2.

[6] The plaintiffs cite section "DI 52001.555C (4) (1992)" of the POMS. Plaintiffs' Memorandum of Law ("Plaintiffs' Memorandum") (Docket No. 19) at 6. Counsel for the defendant informed the court by letter that "according to the Agency, that subchapter [of the POMS] has remained unchanged since 1991." Letter dated May 11, 2001 from Thomas D. Ramsay, Esq. to William Brownell, Clerk at 1. Counsel for the plaintiffs did not respond to this assertion in the memorandum of law subsequently filed on behalf of the plaintiffs, Plaintiffs' Second Reply Memorandum of Law Pursuant to Order of April 27, 2001 (Docket No. 26), and I accordingly will assume (*continued on next page*)

> Furthermore, because the award was a compromising settlement, there is no legal basis for assuming that the settlement was based upon the plaintiff's life expectancy. For all the court knows or the [Commissioner] could determine, the parties may have concluded that the plaintiff's disability claims would not last a lifetime, but only for a specific term of years and reached their settlement based upon that view. Certainly, there is nothing in 39 M.R.S.A. § 71 which provides for a lifetime presumption in the absence of any provision to the contrary; it merely provides that an employer shall be discharged from all further liability upon payment of a lump sum. I find, therefore, that it was reasonable for the Secretary to proceed . . . using the rate paid prior to the lump-sum award, in calculating the setoff.

Id. The plaintiffs in this action do not point to any section of the current version of Maine's workers' compensation statutes that creates such a lifetime presumption. The distinction here is that, while the plaintiffs' initial lump-sum settlement awards did not specify a method of proration, they have each obtained addenda to those awards that specify proration over life expectancy.

In this case, the evidence that the defendant uniformly accepted addenda to Maine workers' compensation lump-sum settlement awards and revised disability benefit payments accordingly, at least between 1994 and early 1997, CEF at 102-09, is undisputed. The applicable section of the POMS does not refer to subsequently-revised workers' compensation lump-sum awards. It provides, in relevant part:

> L[ump] S[um] awards will be prorated at an established weekly rate. The priority for establishing weekly rate is as follows:
>
> a. The rate specified in the LS award. If the LS award specifies a rate based on life expectancy, use that rate to prorate the LS . . . .
>
> b. The periodic rate paid prior to the LS if no rate is specified in the LS award.
>
> c. If W[orkers'] C[ompensation], the State's WC maximum in effect on the date of injury. This figure can be used if no rate is specified in the award and there was no preceding periodic benefit. It can also be used pending postadjudicative development of the rates specified in a. or b. above. The

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that the sections of the POMS at issue did not differ from their current language at any relevant time.

> State maximum is the periodic rate that, in almost every case, would have been payable had periodic payments been made instead of a LS.

POMS § D[isability] I[nsurance] 52001.555C.4.[7] This language is not inconsistent with SSR 97-3 and accordingly *Avery* does not bar the application of SSR 97-3 in appropriate circumstances. However, contrary to the plaintiffs' position, this language also does not mandate the use of a revised lump-sum award rather than the initial award as the basis for calculation of the statutory offset.

Based on the record before the court, SSR 97-3 does represent a substantive change in the manner in which the defendant has treated revised workers' compensation lump-sum awards for purposes of the statutory offset. The Ruling cannot be reasonably characterized as merely clarifying the law or the defendant's existing policy. For all that appears in the record, the defendant's policy before the Ruling was issued was to use the revised awards to calculate or revise the rates of payment of disability benefits to the affected applicants. The Ruling prohibits the use of revised awards. There is no indication in the record that Congress authorized retroactive application of this interpretation of section 424a and SSR 97-3 itself is silent on the question of retroactive application. The defendant has offered no evidence, other than the application of SSR 97-3 to the plaintiffs in this

[7] The plaintiffs also rely on section DI 52001.555(H). Plaintiffs' Memorandum at 6 & n.10. That section, by its terms, is limited to proration of lump sum workers' compensation awards when "excludable expenses" are included in the award. The plaintiffs have made no showing that such expenses were included in any of their awards, and accordingly I do not consider this section of the POMS further.

consolidated action, of his clear intent at the time the ruling was issued to apply it retroactively. For all of the plaintiffs here except Perkins, therefore, use of the Ruling as the basis for the administrative law judge's decision appears to be an impermissible retroactive application. *Pope*, 998 F.2d at 483.

The defendant chooses not to address the issue of retroactive application of SSR 97-3, devoting most of his effort to an argument that the Maine Workers' Compensation Board lacks the power under state law to amend lump-sum settlement awards and that the revised awards submitted by the plaintiffs are accordingly invalid. Defendant's Memorandum at 11-18. This view of Maine law is simply incorrect.

The relevant state statute provides, in pertinent part:

> Clerical mistakes in decrees, orders or others parts of the record and errors arising from oversight or omission may be corrected by the board at any time of its own initiative, at the request of the hearing officer or on the motion of any party and after notice to the parties.

39-A M.R.S.A. § 318 (2001). This language was identical at all times relevant to the addenda obtained by the plaintiffs. 39-A M.R.S.A. § 318 (1995). The addenda at issue here do not change the substance of the lump-sum awards. Compensation to the plaintiffs was not increased by the addenda. The plaintiffs requested the revisions by motion and with notice to the respective employers. CEF at 72-73. The fact that the initial awards did not mention any term may reasonably be considered an "error[] arising from . . . omission" under the circumstances. Even if that were not the case, 39-A M.R.S.A. § 321 allows an employee to file a petition at any time "to have any issues determined in accordance with this Act" or to have "the matters covered by the [settlement] agreement determined in accordance with this Act as though the agreement had not been approved." It would exalt form over substance to require the plaintiffs to file a formal petition to carry out the intent of this section when it is clear, as a result of the notice provided to the employers in each case, that the employers did not contest the requested allocations of the lump-sum awards. While the Maine Law Court has apparently

not ruled on this issue, it is highly unlikely that it would adopt the defendant's view. The Maine Workers' Compensation Board, acting through its hearing examiners, has the authority to amend lump-sum settlement awards that are initially silent as to any proration to include, *inter alia*, proration over the life expectancy of the employee.

The plaintiffs, other than Perkins, as to whom the defendant does not contest this court's jurisdiction, are entitled to the relief that they seek in this proceeding. This court will consider the jurisdictional issue raised by the defendant concerning the other plaintiffs at a time and in a manner to be determined after consultation with counsel.

C. Constitutional Claims

The plaintiffs' remaining claims must be considered with respect to plaintiff Perkins, as to whom I have concluded that the defendant could apply SSR 97-3 without impermissible retroactive effect. The plaintiffs' argument that the ruling does not apply to the situation presented here because the addenda neither alter nor conflict with the initial awards, Plaintiffs' Memorandum at 14, may be dealt with almost as briefly as it is presented in the plaintiffs' memorandum. The actual operative language of the Ruling, quoted above, is not so limited. It provides that the defendant will disregard any amended workers' compensation award "where the terms in the amended document are illusory or conflict with the terms of" the initial award "and where . . . the terms in the amended document[] would have the effect of circumventing the WC offset provisions of section 224 of the Act." SSR 97-3 at 176-77. The life expectancy proration of the addendum at issue here, obtained after the initial workers' compensation lump-sum award was made and sought solely so that it could be presented to the defendant in order to increase benefit payments, has the effect of circumventing the offset

provisions of section 224 because it reduces the offset to a negligible amount.[8] It is that effect which is addressed by the defendant's use of the word "illusory" in the Ruling.

Accordingly, it becomes necessary to address the plaintiffs' contentions that the denial of Perkins' claim violated her federal constitutional rights to procedural and substantive due process of law and to equal protection of the laws.

1. Procedural Due Process. The plaintiffs allege "long delays in securing a decision" as the basis for their procedural due process claim, Plaintiffs' Memorandum at 17, which harmed them in some unspecified way, Plaintiffs' Second Memorandum at 1. They also concede that this is "their least weighty argument." *Id*.

Due process protection extends only to life, liberty or property. *Harper v. Secretary of Health & Human Servs.*, 978 F.2d 260, 263 (6th Cir. 1992). The plaintiffs contend that Perkins had a property interest in a rate of payment of disability benefits based on calculation of the statutory offset using her amended workers' compensation lump-sum award. Plaintiffs' Memorandum at 16. This is so, they contend, because she had already been determined to be eligible for disability benefits before the offset calculation was made or would have been revised. *Id*. However, the First Circuit held in *Splude v. Apfel*, 165 F.3d 85 (1st Cir. 1999), that deductions made from SSD under a windfall offset statute "were computations made in the course of determining what the Social Security Administration should remit to the claimants. The government was hardly obliged to pay out moneys before initially determining what was due." *Id.* at 91. The court concluded that no procedural rights were wrongly denied. *Id*. The plaintiffs argue that *Splude* is not applicable because

[8] Perkins had been receiving monthly workers' compensation benefit payments of $931.45 before the lump sum settlement. Administrative Record for Linda Perkins ("Perkins Rec.") at 21. The addendum prorated the lump sum across her life expectancy, resulting in a monthly rate of $62.94. *Id.*

Perkins presented her amended workers' compensation award to the defendant only after an administrative law judge had determined that she was eligible for disability benefits and an initial calculation of the offset had been made.

It is unnecessary for purposes of Perkins' procedural due process claim to determine whether she had a property interest in an increased amount of monthly payments, because she has made no showing that there was any delay in processing her request for an adjustment, let alone the kind of inordinate delay that might allow a court to find a violation of her right to procedural due process. *See Cronin v. Town of Amesbury*, 81 F.3d 257, 260 (1st Cir. 1996). Nor do the plaintiffs make any attempt to show that, were the delay excessive, available procedures for redress, including resort to this court, would be inadequate. *See Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 40 (1st Cir. 1992).

2. Substantive Due Process. The plaintiffs contend that Perkins was deprived of substantive due process in that there is no rational basis for the defendant's refusal to accept amendments to workers' compensation lump-sum awards that for the first time prorate the awards across the employee's life expectancy. Plaintiffs' Memorandum at 15-16. The policy set forth in SSR 97-3 does not "shock the conscience," one of three alternate bases for finding a substantive due process violation. *Coyne v. City of Somerville*, 972 F.2d 440, 443 (1st Cir. 1992). The plaintiffs do not suggest a violation of any liberty interest, the second possible basis. *Id*. Given the existence of SSR 97-3 before Perkins obtained her amended workers' compensation award and before she requested that the defendant recalculate the offset against her disability payments based on that document, she cannot demonstrate a "legitimate claim of entitlement" to the increased payments that would result. *Barrington Cove Ltd. P'ship v. Rhode Island Hous. & Mortgage Fin. Corp.*, 2001 WL 314921 (1st Cir. Apr. 5, 2001), at

**3. Accordingly, she has not demonstrated the property interest that is necessary to support a substantive due process claim. *Id*.

Even if that were not the case, substantive due process only ensures that the governmental action at issue is not arbitrary and capricious. *Licari v. Ferruzzi*, 22 F.3d 344, 347 (1st Cir. 1994). Here, both the application of SSR 97-3 to Perkins and SSR 97-3 itself bear a rational relationship to the intent of 42 U.S.C. § 424a, which requires a reduction in social security benefits when a recipient is also receiving workers' compensation benefits. While it might better serve that purpose to reject all lump-sum awards that purport to allocate the award over the employee's life expectancy, that issue is not addressed by SSR 97-3, is not before the court, and does not represent the legal standard applicable here. Nothing further than a conceivable rational relationship is required, *Gilbert v. City of Cambridge*, 932 F.2d 51, 65 (1st Cir. 1991), and the defendant easily meets that test on the record presented here. "[I]n the realm of substantive due process, it is only when some *basic and fundamental principle* has been transgressed that the constitutional line has been crossed." *Santiago de Castro v. Morales Medina*, 943 F.2d 129, 131 (1st Cir. 1991) (internal punctuation and citation omitted; emphasis in original). The facts presented to the court in this case do not approach, let alone cross, that line.

3. Equal Protection. The plaintiffs' final argument is that imposing what they characterize as a "changed policy" on Perkins violates her right to equal protection because it is fundamentally unfair and not rationally related to a legitimate governmental purpose. Plaintiffs' Memorandum at 17-20. I have already concluded that SSR 97-3 is rationally related to 42 U.S.C. § 424a, and the plaintiffs do not challenge the statute itself or in any way suggest that the objective of the statute is not legitimate. This finding by itself may be sufficient to dispose of the claim. *See Baker v. City of Concord*, 916

F.3d 744, 747 (1st Cir. 1990) ("[s]ocial welfare . . . legislation runs afoul of the Equal Protection Clause only if it cannot be said to relate rationally to a legitimate state objective").

Even if that were not the case, SSR 97-3 might be regarded as creating a classification by creating two groups of claimants — those who obtain a life-expectancy proration of a lump-sum workers' compensation award at the time of the initial award and those who obtain such a proration later by seeking an amendment of an award otherwise silent on the point — but that classification does not infringe upon the test of rationality applicable to equal protection claims brought under these circumstances. That test "is extremely generous to the government in social and economic matters." *Splude*, 165 F.3d at 92. A policy that seeks to prevent claimants from circumventing the effect of 42 U.S.C. § 424a is not irrational. *See Berger v. Apfel*, 200 F.3d 1157, 1161 (8th Cir. 2000) ("It is implicit in the agency's three-step approach to proration of lump-sum settlements that bare intent to evade the offset is insufficient, and we are unable to conclude the agency's three-step approach is an unreasonable approach to fulfilling its statutory mandate.").

IV. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision with respect to plaintiff Perkins be **AFFIRMED** and that his decisions with respect to plaintiffs K. Clark, M. Decker, J. Derouche, J. Deschaines, S. Henry, P. Morency, R. Rioux, S. Sabine and J. Turcotte for Jeffrey Rubin, as to whom the defendant does not contest jurisdiction, be **VACATED** and remanded for recalculation of the statutory offset. With respect to the following plaintiffs, further proceedings concerning jurisdiction will be necessary: A. Cote, P. Enman, G. Gendron, R. Moody, C. Morin, M. Morin, Carmen Rioux, and D. Rugg. The Clerk shall schedule a follow-up telephone conference with counsel once the court acts on this recommended decision.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 25th day of May, 2001.

_____

David M. Cohen
United States Magistrate Judge

CARMEN RIOUX
plaintiff

MICHAEL A. BELL
786-0348
[COR LD NTC]
621 MAIN STREET
LEWISTON, ME 04240
786-0348

v.

SOCIAL SECURITY ADMINISTRATION
COMMISSIONER
defendant

JAMES M. MOORE, Esq.
[COR LD NTC]
U.S. ATTORNEY'S OFFICE
P.O. BOX 2460
BANGOR, ME 04402-2460
945-0344

THOMAS D. RAMSEY, ESQ.
[COR LD NTC]
JFK FEDERAL BUILDING
ROOM 625
BOSTON, MA 02203-0002

617/565-4277